In The

Supreme Court of the United States

APR 8 19

Term, 1974

No. 73-1502

RAMON COLON,

Petitioner,

vs.

STATE OF NEW YORK, DIVISION OF HUMAN RIGHTS, ROBERT J. MAGNUM, JACK M. SABLE, COMMISSIONERS and ROBERT RUIZ, ASSISTANT COMMISSIONER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Ramon Colon respectfully prays that a writ of certiorari issue to reverse the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on January 10, 1974.

OPINION BELOW

The Court of Appeals of the Second Circuit affirmed the decision of the District Court of the Southern District of New York without opinion. The opinion of the District Court for the Southern District of New York (Bonsal, J.) appears in the appendix (4a). The Appellate Division of the State of New York affirmed the decisions of the State Human Rights Appeal Board. The decision of the New York State Human Rights Appeal Board appears in the appendix (3a). That opinion affirmed the decision of the State Division of Human Rights. The Decision of the State Division of Human Rights appears in the appendix (1a).

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on January 10, 1974. A petition for certiorari was filed within 60 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Does Section 297.2 of the Executive Law of the State of New York allow the State Human Rights Commission to decline jurisdiction over a grievance of one of its own employees for "policy reasons" and if so is the statute constitutional?

2. Is the larger statutory scheme allowing two forums (the Commission or the state courts) still nevertheless discriminatory absent a clear statutory prohibition preventing States Human Rights' employees from using the Commission to redress grievances?

3. Must plaintiff-appellant be given reasons for a denial of promotion and an opportunity to be heard?

STATUTORY PROVISIONS INVOLVED

In addition to Section 297.2 of the Executive Law the following statutory provisions are involved:

United States Constitution, Fourteenth Amendment, Section 1

> " . . . nor shall any State deprive any person of life, liberty or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the law."

42 U.S.C. Section 1981

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, license and exactions of every kind and to no other."

42 U.S.C. Section 1983 further states:

> "Every person who, under color of any statute, ordinance, regulations, custom or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other

person within the jurisdiction thereof, to the deprivation of any right, privilege or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

Sections 297.1 and 297.2 of the Executive Law of the State of New York read as follows:

"1. Any person claiming to be aggrieved by an unlawful discriminatory practice may, by himself or his attorney at law, make, sign and file with the division a verified complaint in writing which shall state the name and address of the person alleged to have committed the unlawful discriminatory practice complained of and which shall set forth the particulars thereof and contain such other information as may be required by the division. The industrial commission or the attorney-general or the division on its own motion may, in like manner, make, sign and file such complaint. In connection with the filing of such complaint the attorney-general is authorized to take proof, issue subpoenas and administer oaths in the manner provided in the Civil Practice Law and Rules. Any employer whose employees or some of them refuse or threaten to refuse to cooperate with the provisions of this article, may file with the division a verified complaint asking for assistance by conciliation or other remedial action.

2. After the filing of any complaint the division shall promptly serve copy thereof upon the respondent and all persons it deems to be necessary

parties and make prompt investigation therewith. Within 15 days after a complaint is filed the division shall determine whether it has jurisdiction and, if so, whether there is probable cause to believe that the person named in the complaint, hereinafter referred to as the respondent, has engaged or is engaging in an unlawful discriminatory practice. If it finds with respect to any respondent that it lacks jurisdiction and that probable cause does not exist, the commission shall issue and cause to be served an order dismissing such allegations of said complaint as to such respondent."

STATEMENT OF THE CASE

This is an action brought by an employee of the Division of Human Rights of the State of New York, who had been "passed over" for promotion from field representative to various other positions. Jurisdiction of this Court is based on the challenged constitutionality of the state statute *infra*. His qualifications and extensive experience are fully set forth in the complaint. He seeks a judgment requiring defendants to appoint him retroactively and with back pay and full pension benefits.

The gravamen of this proceeding is the unconstitutional and arbitrary application of the New York State Executive Law, Article 15, Section 297.2 which states in part:

> "If it finds with respect to any respondent that it lacks jurisdiction or that probable cause does not exist the Commissioner shall issue and cause to be

> served on the complainant an order dismissing such allegations of said complaint as to such respondent."

In point of fact, on or about November 5, 1971, the State Division of Human Rights, determined that it had no jurisdiction in this matter, further stating:

> "It is the *policy* of the State Division of Human Rights not to accept jurisdiction in any case in which discrimination is charged against persons who would be called upon to investigate and/or determine the charges." (Emphasis supplied.)

The decision was upheld by the State Human Rights Appeal Board, the New York Supreme Court, Appellate Division, no opinion, and by the Federal District Court (S.D.N.Y.), Bonsal, J.

"Policy" rather than "lack of jurisdiction" was given as the reason for declining jurisdiction.

Plaintiff, who had been employed by the Commission for a minimum of seven years and who held the position of field representative had extensive qualifications, was passed over for a person with less experience than plaintiff, and on the basis of ethnic politics. Mr. Colon is of Puerto Rican extraction and the persons promoted in each instance were negroes.

No reason was given to plaintiff for defendants' failure to appoint him thus keeping the defendants' contention that they are under no obligation to give reasons for their

actions. This concept of their responsibilities as public officials can no longer be acquiesced in by the courts.

It has become increasingly clear that the refusal of administrative officals to give to employees who are deprived of valuable rights, an opportunity to be heard is a violation of the procedural due processes, guarantees of the state and federal constitutions and the exercise of the Executive Law Section 297.2 is patently unconstitutional in its refusal for *reasons of policy* to accept jurisdiction.

Judge Bonsal limits his decision to a review of the provisions of the New York State Executive Law, holding them to be constitutional because they allow an aggrieved person two forums, i.e., the Commission and the courts and additionally finds that the prohibition against hearing cases of its own employees was a reasonable prohibition. Judge Bonsal avoids strict construction of the statutory wording "lacks jurisdiction" set forth in Executive Law 297.2, but instead allows the Commission to decline jurisdiction. In point of fact every complainant has two forums *except* employees of the Commission, one of which an aggrieved petitioner may not have the time or resources to afford.

REASONS FOR GRANTING THE WRIT

Certain procedural questions must be resolved before the Court reaches the merits herein, First, it is said that the case is moot, in that the named plaintiff, Ramon Colon, has since retired. The fact that the incident which gave rise to the controversy herein has been resolved, the underlying problem remains. The Department continues to fail to give hearings to its own employees, most of whom are

minorities and most of whom cannot afford protracted litigations. This allegedly arbitrary procedure continues to threaten members of plaintiff's class. See *Kelly v. Wyman*, 294 F. Supp. 893, 908 (D.C. 1968); *Singleton v. Board of Com'rs, etc.*, 356 F.2d 771 (5 Cir. 1966).

I.

The statute (Executive Law 297.2) allows dismissal when the Commission "lacks jurisdiction" not when as a matter of policy it refuses to accept jurisdiction.

The case at bar would not now be appealed if the applicable statute, *supra*, had contained language granting the right to refuse jurisdiction for policy reasons. There has been no showing to this day that the Commission "lacks" jurisdiction, only that it chose not to exercise it. The Commission has no such power under the present statutory scheme regardless of how reasonable the refusal might be.

II.

The larger statutory scheme, allowing a choice of two forums for some but not for others is discriminatory.

Had the above section clearly stated that it lacked jurisdiction over its own employees then the plaintiff herein would have saved time and money knowing that he should have chosen the alternative route, i.e., the state courts. Judge Bonsal fails to note that plaintiff was told that plaintiff's recourse was to "appeal this order to the State Human Rights Appeal Board" in the very text of the opinion of the Human Rights Board and not to the state court. Plaintiff and Judge Bonsal were thereby misled.

III.

Applications of recent decisions of the United States Supreme Court and other courts relating to due process in administrative proceedings require that plaintiff be given reasons for his failure to be appointed and an opportunity to be heard.

Cases involving public employment call for a re-examination of previous holdings in light of contemporary requirements of elementary due process, wherever the state has not even required a modicum of due process, i.e., *Kaminsky v. Leary*, 33 A.D. 2nd 552 (1st Dept. 1969), aff'd, 28 N.Y. 2d 959 (1971).

In the leading case of *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Supreme Court held that procedural due process requires a predetermination evidentiary hearing prior to discontinuance of welfare benefits. In so holding the Court set forth the criteria for determining what procedures due process requires in any given set of circumstances as depending upon the extent of the loss to the plaintiff and the necessity for summary adjudication by the government.

There is little question in the instant case that the failure to be promoted, thus condemning the plaintiff to a lifetime in a dead-end job as well as loss of pension benefits constitutes a grievous loss to such employee.

There does not seem to be an equivalent disadvantage to the government in requiring it to give a reason for its actions and to afford a hearing, if requested, to the employee, to give him an opportunity to show arbitrariness on the part of the responsible officials.

> "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly, supra*, 269.

The Court cited approvingly two articles by Charles A. Reich in the Yale Law Journal. In one of them, *The New Property*, 73 Yale Law Journal 733 (1964) he wrote:

> "The denial of any form of privilege or benefit on the basis of undisclosed reasons should no longer be tolerated . . . " (p. 784).

It can no longer be seriously contended that such requirements do not apply to public employees. *Weiman v. Updegraff*, 344 U.S. 183 (1952); *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956).

In the instant case, the requirement that a public official exercise discretion in a manner free from arbitrariness or caprice means that issues of fact are often involved. Thus, a decision not to appoint a particular person could be based on oral or written reports containing false statements which the employee has no opportunity to rebut. Or a personality conflict with a supervisor might be involved.*

---

* In *Ramos v. Department of Mental Hygiene*, 34 A.D. 2nd 925 (1970), the First Department held that a hearing was required for a probationary employee who alleged that her dismissal was due to a personality conflict and unrelated to work performance. See also *Berger v. Walsh*, 266 App. Div. 592 (First Department, 1943). (Cf. *Fink v. Finegan*, 270 N.Y. 356 (1936), where the court held that one could not be eliminated for lack of force or executive ability unless it was shown that these criteria could not be competitively tested or objectively ascertained.)

Or the appointing authority may not like the employee's politics. Moreover, since a public official is not required to give a reason for failure to promote a smart official who keeps his mouth shut can pass over qualified employees for the most specious reasons. But such action does not comport with the clear requirements of due process. As the Court said in *Goldberg v. Kelly*, *supra*, at 267-268:

> "The fundamental requisite of due process of law is the opportunity to be heard '. . .the hearing must be at a meaningful time and in a meaningful manner. . . .' In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, an effective opportunity to defend by confronting any adverse witnesses and by presenting orally. These rights are important in cases such as those before us, where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or misapplication of rules or policies to the facts of a particular case."

In a recent case involving the application of due process requirements to public employment, *Roth v. Board of Regents*, 446 F.2d 806 (7th Cir. 1971), the court held that a non-tenured professor was entitled to be given reasons for his dismissal and a hearing. Citing *Goldberg v. Kelly*, *supra*, and referring to the balancing of interests involved, the court held that the substantial adverse effect which the professor's non-retention would have on his career outweights the governmental interest in

"unembarrassed exercise of discretion." See also *Meredith v. Allen County Memorial Hosp. Comm'n.*, 397 F.2d 33 (6th Cir. 1968). *Goldberg v. Kelly, supra*, has also been extended in *Java, et al. v. Dep't of California*, 317 F. Supp. 875 (N.D. Calif. 1970) to unemployment compensation.

New York courts also applied the rule enunciated in *Goldberg v. Kelly, supra.* Thus in *William v. White Plains Housing Authority*, 62 M. 2d 613 (Supreme Ct. Westch. Co. 1970), aff'd, 35 A.D. 2d 965, the Court, citing *Goldberg v. Kelly*, held that the hearing afforded tenants of public housing prior to eviction did not comply with due process requirements. To ensure that an eviction is not arbitrary or based upon mere whim or caprice, the tenant must be advised of the reason for his eviction and an opportunity to be heard at a meaningful time and in a meaningful manner. The Court, in coming to its conclusion, stated (62 Misc. 2d 613):

> "It can no longer be disputed that due process of law extends to those situations where a citizen may be deprived of life, liberty or property whether the proceeding be judicial, administrative or executive in nature.... This is rooted in a fundamental concept that the essence of due process is the protection of the individual against arbitrary action." *Ohio Bell Telephone v. Public Utilities Commission*, 301 U.S. 292, 302; *Slochower v. Board of Education*, 350 U.S. 551, 559.

In *Crow v. California Dept. of Human Resources*, 325 Fed. Supp. the court stated at 1318:

> "The right to confront and cross examine witnesses, where an important decision hinges on a question of fact, is *not* an 'extraordinary remedy.' It has been found by the Supreme Court to be constitutionally mandated 'in almost every setting'." Citing *Goldberg v. Kelly*.

The statute in the instant case encourages discrimination. The great number of people working in the public sector are minorities to which this remedy is foreclosed. 333 F.S. 662.

Grune v. McElroy, 360 U.S. 474, 496-497 (1959) is particularly important here.

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual and the reasonableness of the action depends on fact finding, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who in fact, might be perjurious or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy. They have ancient roots. They find expression in the Sixth Amendment . . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in nominal cases . . .but also in all types of cases where administrative . . .actions were under scrutiny."

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Second Circuit.

Respectfully submitted,

s/ Edward H. Wolf
Attorney for Petitioner

APPENDIX A – DECISION OF NEW YORK STATE DIVISION OF HUMAN RIGHTS

DETERMINATION AND ORDER AFTER INVESTIGATION

Case No. Ia-CN-1392-71: Ramon Colon vs. State of New York, Division of Human Rights; Jack M. Sable, Commissioner; Ruperto Ruiz, Assistant Commissioner and Robert J. Mangum.

On October 20, 1971, Ramon Colon, who is of Puerto Rican national origin, filed a verified complaint with the State Division of Human Rights charging the above named respondents with an unlawful discriminatory practice relating to employment by denying him equal terms, conditions and privileges of his employment because of his national origin, in violation of the Human Rights Law of the State of New York.

Pursuant to Section 297.2 of the Law, the State Division of Human Rights has determined that it has no jurisdiction in this matter.

It is the policy of the State Division of Human Rights not to accept jurisdiction in any case in which discrimination is charged against persons who would be called upon to investigate and/or determine the charges.

Upon the foregoing, the complaint is ordered dismissed and the file is closed.

The complainant or any party to the proceeding before the Division may appeal this order to the State Human

Decision of New York State Division of Human Rights

Rights Appeal Board, 250 Broadway, New York, New York 10007, by filing a notice of appeal within fifteen (15) days after the date of the mailing of this order. (Emphasis supplied.)

DATED:

STATE DIVISION OF HUMAN RIGHTS

By Albert Herchick
Albert Herchick
Regional Manager

TO:
Mr. Ramon Colon, Complainant
342 East 32nd Street
Brooklyn, New York 11226

State of New York - Respondent
Division of Human Rights
270 Broadway
New York, New York 10007

Att: Jack M. Sable, Commissioner

cc:
Ruperto Ruiz, Assistant Commissioner
Honorable Robert J. Mangum
NYS Court of Claims
270 Broadway, New York, N.Y. 10007

APPENDIX B – ORDER OF APPELLATE DIVISION OF STATE OF NEW YORK

RAMON COLON,
Complainant-Appellant,

vs.

STATE OF NEW YORK, DIVISION OF HUMAN RIGHTS, JACK M. SABLE, Commissioner; RUPERTO RUIZ, Assistant Commissioner, and ROBERT J. MANGUM,
Respondents.

The above entitled appeal having come on for consideration by this Board on the 21st day of December 1971, and oral argument not having been requested by any of the parties herein, and the Board having reviewed the record and having decided that the order appealed from is not arbitrary, or capricious or an abuse of discretion, it is

ORDERED that the Decision and Order of the Division of Human Rights made herein on the 5th day of November 1971, be and the same hereby is in all respects affirmed.

Dated: December 31, 1971

Mailed: January 11, 1972

STATE HUMAN RIGHTS APPEAL BOARD

By Edward Conway
Edward Conway, Chairman

APPENDIX C - OPINION OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RAMON COLON,
Complainant-Appellant,

vs.

STATE OF NEW YORK, DIVISION OF HUMAN RIGHTS, JACK M. SABLE, Commissioner; RUPERTO RUIZ, Assistant Commissioner, and ROBERT J. MANGUM,
Respondents.

MEMORANDUM

BONSAL, D. J.

Plaintiff, a retired employee of the Division of Human Rights of the State of New York ("Human Rights Division"), instituted this action on August 11, 1972, pursuant to 42 U.S.C. Sections 1981 and 1983, claiming a denial of equal protection of the law under the 14th Amendment to the United States Constitution due to discrimination by defendants in denying him equal terms, conditions and rights of promotion because of his national origin. He named as defendants the Human Rights Division; Mr. Jack M. Sable, Commissioner; Mr. Rupert Ruiz, Assistant Commissioner; and Mr. Robert J. Magnum. Plaintiff alleges (1) that he filed a verified complaint on October 20, 1971 with the Human Rights Division, charging it with unlawful discriminatory practices relating to his employment; and (2) that his complaint was

dismissed pursuant to New York Executive Law Section 297.2 on the ground that the Human Rights Division did not take jurisdiction in cases in which discrimination is charged against the persons who would be called on to investigate or determine the charges.

Plaintiff contends that Section 297.2 is an unconstitutional denial of equal protection in that it allows the Human Rights Division to refuse to accept jurisdiction in cases involving its own employees.

Plaintiff seeks an order requiring defendants to promote him retroactively from Field Representative to a policy-making position and to award him back pay and damages in the amount of $1,000,000, and full pension benefits. Jurisdiction is claimed under 28 U.S.C. Section 1331.

Defendants move for an order granting judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure, or in the alternative, for summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure.

From the affidavits submitted — both by defendants and by the plaintiff — it appears that the following facts are undisputed: Plaintiff, who is of Puerto Rican origin, was hired as a provisional Field Representative for the Human Rights Division in 1964. In 1965 he was appointed a permanent Field Representative and continued to be employed in that position until May 1, 1972, when he retired, having reached the mandatory retirement age of 70. On July 1, 1970, and on other occasions, plaintiff

requested promotion to a policy-making position in the Human Rights Division, which requests were denied. The Human Rights Division's determination on November 5, 1971 that it lacked jurisdiction over plaintiff's complaint was upheld by the New York State Human Rights Appeal Board on December 31, 1971. Thereafter, plaintiff sought judicial review pursuant to Section 298 of the New York Executive Law. The agency determination was affirmed by the Appellate Division, First Department, on April 13, 1972. It appears from the papers submitted that the Human Rights Division does employ Puerto Rican and Spanish-speaking persons in policy-making positions, including one of the named defendants. [1]

The narrow issue presented here is whether Section 297.2 of the New York Executive Law is constitutional. Section 297.2 provides:

> "Within fifteen days after a complaint is filed, the division shall determine whether it has jurisdiction and, if so, whether there is probable cause to believe that the person named in the complaint, hereinafter referred to as the respondent, has engaged or is engaging in an unlawful discriminatory practice. If it finds with respect to any respondent that it lacks jurisdiction or that probable cause

1. Attached to Commissioner Jack Sable's affidavit in support of the present motion is a letter from Mr. Robert J. Magnum to plaintiff, dated September 10, 1970. That letter lists five Spanish-speaking and Puerto Rican persons employed by the Human Rights Division in policy-making positions: Mr. Ruperto Ruiz, Mr. William Vega, Mr. Anthony Sirvent, Mr. George Benitez, and Mr. Jose Torres.

> does not exist, the commissioner shall issue and cause to be served on the complainant an order dismissing such allegations of the said complaint as to such respondent."

This subsection is part of the larger statutory scheme contained in Section 297, which provides that:

> "1. Any person claiming to be aggrieved by an unlawful discriminatory practice may, by himself or his attorney-at-law, make, sign and file with the division a verified complaint in writing which shall state the name and address of the person alleged to have committed the unlawful discriminatory practice complained of.
>
> * * *
>
> "9. Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages and such other remedies as may be appropriate, unless such person had filed a complaint hereunder . . . provided that, where the division has dismissed such complaint on the grounds of administrative convenience, such person shall maintain all rights to bring suit as if no complaint had been filed."

In *State Division of Human Rights v. Luppino*, 35 A.D. 2d 107, 313 N.Y.S.2d 28 (2d Dept. 1970), *aff'd*, 29 N.Y.2d 558, 324 N.Y.S.2d 298 (1971), the court held that "in enacting section 297 . . . of the Executive Law, the Legislature intended to give individuals a choice. They

could either elect to sue in court and recover all damages which they could establish . . . or they could elect to seek administrative relief under the Human Rights Law." 313 N.Y.S.2d at 32. See *Cluett, Peabody & Co. v. New York State Division of Human Rights*, 59 Misc. 2d 536, 299 N.Y.S. 2d 974 (Sup. Ct. Orange Cty. 1969).

On its face, Section 297.2 is nondiscriminatory. The Human Rights Division's policy not to take jurisdiction in cases involving its own employees is reasonable and rationally-based, operating equally with respect to all of its employees. Moreover, the policy only precludes administrative action; it does not preclude the institution of a suit in the New York State courts. Therefore, Section 297.2 is a proper exercise of state power and is not arbitrary nor capricious. See *Dandridge v. Williams*, 397 U.S. 471, 485-87 (1970). See also *Jefferson v. Hackney*, 406 U.S. 535, 545-51 (1972); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172-73 (1972). Nor has plaintiff here set forth facts sufficient to demonstrate that his nonpromotion was arbitrary, capricious, or constituted a violation of his civil rights. The bare assertion of legal conclusions is not enough. *Powell v. Workmen's Compensation Board*, 327 F.2d 131, 137 (2d Cir. 1964); *Powell v. Jarvis*, 460 F.2d 551, 553 (2d Cir. 1972). Since plaintiff fails to raise a substantial federal question, his complaint is dismissed.[2] *Christman v. Skinner*, F.2d (2d Cir. October 30, 1972).

2. Since promotion or nonpromotion of employees is a matter of supervisory discretion, *Gnotta v. United States*, 415 F.2d 1271, 1276 (8th Cir. 1969), *cert. denied*, 397 U.S. 934 (1970), particularly when promotions are to policy-making positions, it did not constitute a deprivation of due process for the Human Rights Division to decline to state its reasons for promoting others than the plaintiff.

Opinion of the District Court

Defendants contend that plaintiff's action is barred by the 11th Amendment to the United States Constitution. They argue that any injunctive or declaratory relief would be moot due to plaintiff's retirement and that a federal court, absent New York State's consent, is without jurisdiction to enter a judgment declaring a liability which must be met from the public funds of the state. See *Rothstein v. Wyman*, 467 F.2d 226, 236-39 (2d Cir. 1972). Because of the above disposition of defendants' motion, it is not necessary to reach this issue.

For the foregoing reasons, defendants' motion for summary judgment is granted and plaintiff's complaint is dismissed.

It is so ordered.

Dated: New York, N. Y.
January 5, 1973

s/ Dudley B. Bonsal
U.S.D.J.

APPENDIX D – JUDGMENT OF UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RAMON COLON,
Complainant-Appellant,

vs.

STATE OF NEW YORK, DIVISION OF HUMAN RIGHTS, JACK M. SABLE, Commissioner; RUPERTO RUIZ, Assistant Commissioner, and ROBERT J. MANGUM,
Respondents.

Defendants having moved the Court for an order granting judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure, or in the alternative, for summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, and the said motion having come on to be heard before the Honorable Dudley B. Bonsal, United States District Judge, and the Court thereafter on January 5, 1973, having handed down its memorandum decision granting the defendants' motion for summary judgment and dismissing the complaint, it is,

ORDERED, ADJUDGED AND DECREED: That the defendants, STATE OF NEW YORK, DIVISION OF HUMAN RIGHTS, ROBERT J. MAGNUM, JACK M.

Judgment of the United States District Court

SABLE, COMMISSIONER, AND RUPERT RUIZ, ASSISTANT COMMISSIONER, have judgment against the plaintiff, RAMON COLON, dismissing the complaint.

Dated: New York, N. Y.
January 6, 1973

s/ John Livingston
Clerk

APPENDIX E – JUDGMENT OF UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS
For The
Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of January one thousand nine hundred and seventy-four.

Present:

HON. JOHN A. DANAHER

HON. WILLIAM H. MULLIGAN

HON. WILLIAM H. TIMBERS

Circuit Judges.

Judgment of the United States Court of Appeals

Ramon Colon,

Plaintiff-Appellant,

v.

State of N.Y., Div. of Human Rights, Robert J. Magnum, Jack M. Sable, Commissioner, & Robert Ruiz, Asst. Commissioner,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

s/ John A. Danaher
JOHN A. DANAHER

s/ William H. Mulligan
WILLIAM H. MULLIGAN

s/ William H. Timbers
WILLIAM H. TIMBERS

MAY 22

MICHAEL RODAK,

Supreme Court of the United States

No. 73-1502

RAMON COLON,

Petitioner,

against

STATE OF NEW YORK, DIVISION OF HUMAN RIGHTS, ROBERT J. MAGNUM, JACK M. SABLE, COMMISSIONERS, and ROBERT RUIZ, ASSISTANT COMMISSIONER,

Respondents.

BRIEF IN OPPOSITION TO CERTIORARI

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondents State of New York, Division of Human Rights, Robert J. Magnum, Jack M. Sable, and Robert Ruiz

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Assistant Attorney General
of Counsel

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Supreme Court of the United States

No. 73-1502

RAMON COLON,

Petitioner,

against

STATE OF NEW YORK, DIVISION OF HUMAN RIGHTS, ROBERT J. MAGNUM, JACK M. SABLE, COMMISSIONERS, and ROBERT RUIZ, ASSISTANT COMMISSIONER,

Respondents.

BRIEF IN OPPOSITION TO CERTIORARI

In this application petitioner, a former state employee, makes two claims: firstly, failure to provide a statement of reasons and a hearing as to his non-promotion within the New York State Division of Human Rights is a denial of his right to due process; secondly, the policy of the Division of Human Rights of refusing to accept jurisdiction in discrimination complaints involving its own employees, pursuant to New York Executive Law § 297.2, is a denial of his right to equal protection.*

* The equal protection claim was advanced at considerable length in plaintiff's complaint in the district court (a copy of the complaint is found in Appendix C). However, in the court below and his present petition Colon has relied primarily on the due process argument. In any event, we discuss the equal protection claim at pp. 8-9, herein.

Opinion Below

On January 10, 1974, the Second Circuit affirmed without opinion the decision of the United States District Court of the Southern District of New York (BONSAL, J.). The Second Circuit decision has not yet been reported. The opinion of the District Court has not been reported, but it is reproduced at pp. 4a-9a of Colon's petition.

Jurisdiction

Appellant invokes the jurisdiction of this court under 28 U.S.C. § 1254(1).

Statute Involved

New York State Executive Law § 297.2.

Questions Presented

1. Whether this action is moot?

2. Whether this action is barred by the Eleventh Amendment?

3. Whether the complaint fails to state a substantial federal question?

Statement of the Case

Appellant, who is of Puerto Rican origin, is a retired employee of the Division of Human Rights of the State of New York (hereinafter called "Division"). He had been hired as a provisional Field Representative for the Human Rights Division in 1964; in 1965 he was appointed a permanent field representative and continued to be employed

in that position until May 1, 1972 when he retired, having reached the mandatory retirement age of 70.

Appellant alleged that on July 1, 1970, and on other occasions, he had requested promotion to a policy-making position in the Division and that these requests were denied. He thereupon filed a complaint on October 20, 1971 with the Division, charging it with unlawful discriminatory practices relating to his employment.

On November 5, 1971 this complaint was dismissed pursuant to New York Executive Law § 297.2 on the ground that the Division does not take jurisdiction in cases involving its own employees. However, on November 8, 1971 the Human Rights Commissioner, Jack M. Sable, offered to appoint a special neutral panel to investigate petitioner's claim (a copy of Commissioner Sable's letter is found in Appendix A at p. 10 herein). But, through his attorney, petitioner spurned this offer (a copy of petitioner's letter is found in Appendix B at p. 12 herein).

Accordingly, on December 31, 1971 the dismissal of the complaint was upheld by the New York State Human Rights Appeal Board.

Appellant then sought judicial review pursuant to § 298 of the New York Executive Law. The agency determination was affirmed by the Appellate Division, First Department, 39 A D 2d 650, 330 N.Y.S. 2d 1013 without opinion (1972).

Appellant did not seek further appeal but instead brought this action on July 28, 1972 pursuant to 42 U.S.C. §§ 1981 and 1983 in the District Court alleging that the appellees had discriminated against him on the basis of his national origin by denying him a promotion to a policy making position with the Division. He sought an order requiring appellees to promote him retroactively from field representative to a policy-making position and to award

him damages in the amount of $1,000,000 and full pension benefits (See Appendix C).

On January 5, 1973 the District Court (BONSAL, D. J.) dismissed the complaint finding that the policy of the Division not to take jurisdiction in cases involving its own employees was reasonable and rationally based (Petition, 8a). The Court also held that petitioner had failed to set forth facts sufficient to demonstrate that his non-promotion was arbitrary, capricious or that it constituted a violation of his civil rights.

On January 10, 1974 the Court of Appeals affirmed without opinion the determination of the district court.

Reasons for Denying Certiorari

I. The Instant Action Was And Is Moot.

Petitioner claims that he was denied promotion to a policy-making position by the defendants because of his ethnic background. He concedes, however, that he has been retired from the Division since May, 1972, when he reached the mandatory retirement age of seventy. Accordingly, since petitioner can no longer be promoted, his claims were and are clearly moot. *Defunis* v. *Odegaard*, —— U.S. —— (April 23, 1974), 42 U.S.L.W. 4578; *North Carolina* v. *Rice*, 404 U.S. 246 (1971), noting at 246 that "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them".*

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* Moreover, declaratory relief cannot be granted unless:

"The facts alleged, under all circumstances show that there is a substantial controversy between parties having adverse legal interests, of sufficient *immediacy* and *reality* to warrant the issuance of a declaratory judgment". *Maryland Gas Co.* v. *Pacific Coal & Oil Co.*, 312 U.S. 270-273 (emphasis added).

This is plainly *not* the case here.

Incredibly, petitioner does not controvert the fact that his own claims are moot (see petition, p. 7, noting that "the incident which gave rise to the controversy herein has been resolved"). Instead, he contends that his statutory arguments are still viable on behalf of an *alleged* class of employeees similarly situated to himself. The short answer to this argument is that since plaintiff never sought to maintain his action as a class action in the court of original jurisdiction, he certainly cannot, on his own whim, do so at this late date. Furthermore, no facts as to the existence of any such class were presented to meet the requirement of F.R.C.P. 23.

II. The Present Action Is Barred By The Eleventh Amendment.

Aside from the problem of mootness, it is equally apparent that petitioner's spurious claim for $1,000,000 in retroactive damages against a state agency and its officers is barred by the Eleventh Amendment.

As this Court recently stated in *Edelman* v. *Jordan*, —— U.S. —— (March 25, 1974), 42 U.S.L.W. 4419, 4422:

> ". . . The rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment."

See also, *Dugan* v. *Rank*, 372 U.S. 609, 620 (1963); *Rothstein* v. *Wyman*, 467 F. 2d 226, 236-237 (2d Cir. 1972), *cert. den.* 411 U.S. 921 (1973).

Needless to say, the rule has no application where damages are prospective, see *Edelman*, 42 U.S.L.W. at 4422-4423, but this is plainly not the case here. Plaintiff himself has conceded that his claims terminated with his retirement in 1972; thus all the damages he is seeking are clearly for past wrongs, accumulated prior to the time of the present lawsuit.

III. The Complaint Raises No Substantial Federal Question.

In the final analysis, petitioner's application fails to raise any substantial federal question within the meaning of 28 U.S.C. § 1343.* The measuring rod for substantiality is whether "the prior decisions [of this Court] inescapably render the claim frivolous", *Goosby* v. *Osser*, 409 U.S. 512 (1973) at 518; also *Haggans* v. *Wyman*, —— U.S. —— (March 25, 1974). This, as the district court has already recognized, is precisely the characterization that must be applied to petitioner's due process and equal protection claims herein (Petition, 8a).

A.

Petitioner's essential claim involves a so-called due process argument—that he was entitled to a statement of reasons and a hearing on the decision not to promote him. However, this claim has no support in recent decisions of this court.

Just recently, on February 25, 1974, this court in *Koscherak, et al.* v. *Schmeller, et al.*, 42 U.S.L.W. 3484, rejected an appeal by candidates in a civil service examination who raised the identical claims as the present petitioner. The Court affirmed the decision of a three judge court of the Southern District of New York (363 F. Supp. 932) which held there was "no entitlement" of an individual "to demand that [the] government in effect grant hearings and give written reasons for hiring and promotion decisions as a matter of due process of law" (363 F. Supp. at 936). To a similar effect see *Fuld* v. *Elliot*,

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* This is apart from *res judicata* as a result of the prior state litigation raising the claim of discrimination, *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923); *Angel* v. *Bullington*, 330 U.S. 183 (1947); *Francisco Enterprises* v. *Kirby*, 482 F. 2d 481 (9th Cir. 1973); *Tang* v. *Appellate Division*, 487 F. 2d 138 (2d Cir. 1974), cert. den. —— U.S. —— (April 1, 1974), 42 U.S.L.W. 3351.

— U.S. — (November 12, 1973, 42 U.S.L.W. 3290, affirming 40 A D 2d 950 (1st Dept. 1972).

The *Koscherak* and *Fuld* decisions indisputably flow from the prior decision of this Court in *Board of Regents* v. *Roth*, 408 U.S. 564 (1972); also, *Perry* v. *Sinderman*, 408 U.S. 593, 599 (1973).*

Aside from the obvious adverse case law barrier to his action,** petitioner's cause is undermined by the uncontroverted facts herein.

On November 8, 1971, after the Division had declined jurisdiction to hear his case, Commissioner Sable offered to appoint a special panel to investigate petitioner's complaint (Appendix A). However, in a letter dated November 12, 1971, petitioner's counsel at the time rejected the offer, stating that the panel would constitute a "kangaroo court" (Appendix B). Colon is thus in the incredible position of claiming on the one hand that he is entitled to a hearing and a statement of reasons as to his non-promotion from his employer and, on the other hand, as having stated in advance that any findings by his employer would have been biased.

It should also be noted that the complaint fails to allege any facts supporting petitioner's underlying claim that he

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* *Koscherak*, cited *supra*, 363 F. Supp. at 934-935, contains a discussion of the relationship of the issues raised herein to the *Roth-Sinderman* cases.

** We are puzzled by petitioner's repeated reliance on *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) [Petition, pp. 9-13]. In *Goldberg*, this Court specifically *rejected* the argument that the rationale which favors extending pretermination evidentiary hearings to welfare recipients applies to public employees. 397 U.S. at 263, n. 10. The point was reiterated by this Court in its recent decision in *Arnett* v. *Kennedy*, — U.S. — (April 16, 1974), 42 U.S.L.W. 4513, where it was held, *inter alia*, that the failure to provide a trial-type, pre-removal hearing for a non-probationary Office of Economic Opportunity employee was *not* a denial of due process.

was not promoted because of his ethnic background. Indeed, all the complaint alleged was that "upon information and belief, during the past few years there have been unfilled higher level positions in the Division where plaintiff's talents and experience could have been used to advantage" and that "it is plaintiff's belief that the available positions remained vacant or were given to others with far less experience and knowledge of the New York Puerto Rican community" (Appendix C, see, in particular, paras. 17, 18). These are, at best, mere conclusory allegations which are insufficient to state a cause of action showing an intention and purposeful deprivation of constitutional rights, as required of a complaint under the Civil Rights Act. See *Snowden* v. *Hughes*, 321 U.S. 1 (1944).

What petitioner is really claiming is that he believed he was qualified for promotion, but that the named defendants did not agree with him. Such an "abstract" belief plainly does not rise to the level of a constitutional violation. *Roth*, 408 U.S. at 577.

B.

Petitioner also contends that the policy of the Division of refusing to accept jurisdiction in discrimination cases involving its own employees, pursuant to New York Executive Law § 297.2, is an unconstitutional denial of his right to equal protection of the law (Petition, p. 8). However, the claim is blatantly preposterous.

The motivation for the Division's policy is obvious and clearly meets the test of this court that it "rationally further[s] some legitimate, articulated state policy", *McGinnis* v. *Royster*, 410 U.S. 263, 273 (1973); also, *Dandridge* v. *Williams*, 397 U.S. 471 (1970). As the Division indicated in its decision herein (Petition, 1a), it is merely seeking to avoid cases "in which discrimination is charged against persons who would be called upon to investigate and/or determine the charges". Thus, contrary to petitioner's

assertion, the idea is to *eliminate* rather than to *increase* discrimination.

As we have noted, petitioner summarily rejected an offer by the Human Rights Commissioner to have a special committee hear his claims (see *infra*, p. 10). Thus, although petitioner has been quick to claim discrimination by the Division, he was unwilling to avail himself of a practical proposal to have his so-called claim of discrimination heard and evaluated by an "independent decision maker", *Morrissey* v. *Brewer*, 408 U.S. 471, 486 (1972); also, *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). Petitioner's alleged plight is entirely a product of his own doing.

CONCLUSION

For the foregoing reasons, petitioner's application should be denied.

Dated: New York, New York, May 16, 1974.

Respectfully submitted,

Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for Respondents State of New York, Division of Human Rights, Robert J. Magnum, Jack M. Sable, and Robert Ruiz

Samuel A. Hirshowitz
First Assistant Attorney General

David R. Spiegel
Assistant Attorney General
of Counsel

APPENDIX A

Letter of Jack Sable.

(EMBLEM)

JACK M. SABLE
Commissioner

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
DIVISION OF HUMAN RIGHTS
270 Broadway, New York, N.Y. 10007

November 8, 1971

Mr. Ramon Colon
342 East 32nd Street
Brooklyn, New York

Dear Mr. Colon:

By now you have probably received a copy of the determination dismissing your case for lack of jurisdiction. I have directed that the agency not accept jurisdiction because I believe that in fairness to you or any other employee of the Division who feels he has been discriminated against because of his race, creed, color, national origin, age or sex by this agency that for the Division to accept jurisdiction would be tantamount to asking the accused to judge the accuser.

I consider the charges made in your complaint extremely serious. They should certainly receive attention, but not in such a way as to permit any suspicion that they have not received the independent and impartial consideration that would be expected in another forum.

In view of the foregoing and the alternatives expressed in the Human Rights Law, it is my policy to consider cases involving charges of discrimination made by employees against the Division, particularly where they in-

volve personnel who would of necessity be involved in the investigation and determination of the charges, as beyond the scope of the Division's jurisdiction.

However, because I have a very deep concern with respect to the serious charges you have made. I am directing an immediate investigation into those charges. I have appointed Mr. Jose Ramon Torres, Hearing Examiner; Mr. Robert R. Shaw, Associate Director of Regional Affairs; and Mr. Antonio R. Sirvent, Regional Manager of the Bronx office, as a panel to consider the charges and report to me. This, of course, will be in addition to any and all rights you have either under the Human Rights Law, Civil Service Law or any other Law.

Sincerely,

JACK M. SABLE
Commissioner

APPENDIX B

Letter of Jack Baum.

JACK BAUM
Attorney at Law
66 Court Street
Brooklyn 1, N. Y.

MAin 4-7791

November 12, 1971

Commissioner Jack M. Sable
Division of Human Rights
270 Broadway
New York, N.Y. 10007

Re: RAMON COLON v. STATE OF NEW YORK DIVISION OF HUMAN RIGHTS et al.
Case No. IaCN-1372-71

Dear Commissioner:

This letter is in reply to your letter of November 8, 1971, addressed to my client.

Firstly, as the attorney for Ramon Colon, in the pending matter before the Division, your communication should have been addresed to me directly and not to my client.

Second, your letter points out that the Division's dismissal of the above case was because "to accept jurisdiction would be tantamount to asking the accused to judge the accuser. But further in your letter you state that you have appointed a three man panel to investigate my client's case.

This is to advise you that my client rejects your appointment of a kangaroo court, set up by you (the accused), outside the Division's facilities. Under no circumstances

will my client be bound by the findings of the three Division personnel *you* appointed.

Your conduct exhibited herein, is most unprecedented, to say the least.

I might add, that the order of dismissal in the above matter and the enclosure letter attached thereto were both undated, a most peculiar occurrence.

Hereafter, kindly refrain from addressing any correspondence to my client Ramon Colon.

In conclusion, may I call your attention to the fact that despite the Division's order of dismissal in the above matter, an appeal is pending, and further legal proceedings are contemplated. It would, in my judgment, therefore, be highly irregular and improper for you or the Division to angage in any correspondence with my client or I, or any investigation outside the customary legal facilities under which the Division functions.

Very truly yours,

JACK BAUM

JB:jk

Copy to Human Rights Appeal Board
250 Broadway
N.Y., N.Y. 10007

APPENDIX C

Complaint.

IN THE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 72 Civ. 3421

RAMON COLON,

Plaintiff,

against

STATE OF NEW YORK, DIVISION OF HUMAN RIGHTS, ROBERT J. MAGNUM, JACK M. SABLE, COMMISSIONER, and RUBERT RUIZ, ASSISTANT COMMISSIONER,

Defendant.

RAMON COLON, through his attorney, EDWARD H. WOLF, alleges and states:

JURISDICTION

1. That plaintiff has been deprived of "equal protection" of law under the 14th amendment of the United States Constitution due to discrimination against plaintiff by defendants in denying equal terms, conditions and rights of promotiton because of plaintiff's national origin.

2. Plaintiff further contends that Article 15 section 297.2 is unconstitutional under the "equal protection clause" of the Constitution of the United States as it reserves unto the State Division of Human Rights (New York), the power not to accept jurisdiction for some, but not for

others. Specifically it allows the aforesaid Agency to refuse to accept jurisdiction in cases involving its own employees. (See decision of the State Division of Human Rights, annexed hereto and made a part hereof, annexed as Exhibit A).

3. Plaintiff has exhausted all administrative remedies available to him under the Laws of the State of New York.

4. Plaintiff has not availed himself of Federal Administrative remedies pursuant to Section 42 U.S.C. 2000 et seq. as the plaintiff elected to pursue state remedies and the statute of limitations with respect to the Federal Administrative remedies has expired.

5. Further, the amount in controversy exceeds $10,000.00.

PARTIES

6. Plaintiff—Ramon Colon—342 East 32nd Street, Brooklyn, N.Y., previously employed as a field representative for the New York State Division of Human Rights since 1964.

7. Defendant—state of New York, Division of Human Rights.

8. Defendant—Robert J. Mangum—Commissioner.

9. Defendant—Jack M. Sable—Commissioner.

10. Defendant—Rubert Ruiz—Assistant Commissioner.

FACTS

11. Plaintiff was employed by the State of New York Commission of Human Rights (since 1968 known as Divi-

sion of Human Rights) on September 3, 1964 as a field representative. It is plaintiff's belief that he was hired on the professional staff because of the Commission's needs for a true representative of the New York Puerto Rican Community and for his experience, identification and communication in the Puerto Rican Community for over forty years.

12. Upon being employed by the State Division of Human Rights, Human Rights, plaintiff was designated as a field representative. For seven years, plaintiff was engaged in the investigation of complaints alleging discrimination, attending conferences in that connection, writing conference reports, and performing other regular duties as a field representative. Plaintiff also performed additional duties requiring supervisory, administrative and policy making talents such as the following:

(a) For the Department of Research, John H. Bushness, director, plaintiff reviewed three books about Puerto Ricans, to wit: Glazer and Moynihan, *Beyond the Melting Pot* (1963); Glazer and McEntire, *Housing and Minority Groups* (1960); Handlin, *The New Comers* (1969).

(b) For the Department of Communications and Public Relations, Ralph Katz, Director, plaintiff analyzed and translated into English various Spanish-language newspaper articles regarding Puerto Rican problems. Furthermore, plaintiff presented lectures in both Spanish and English regarding the aims of the Division to various community groups, including school children.

(c) Plaintiff was assigned to the Brooklyn office of the Division located at 118 Court Street, Brookyln, New York, by respondent agency's Department of Research (Dr. Bushnell) to prepare a study concerning the enrollment of Puerto

Rican children in the various school districts in Brooklyn, New York. A map of Brooklyn was prepared by plaintiff pursuant to the study, indicating the areas of residence of such children.

(d) During 1967, between the months of March and October thereof, petitioner managed the Bedford-Stuyvesant branch office of the Division, located at 550 Nostrand Avenue, Brooklyn, N.Y., where plaintiff supervised the work of Charles Collier, Field Representative, and Julia Torres, Stenographer.

(e) On or about June, 1968, plaintiff was assigned to manage the main Brooklyn office of the Division at 26 Court Street, Brooklyn, N.Y., where plaintiff had under his supervision Dorothy Dillahunt and Earnell Brown, both stenographers.

FOR A FIRST SEPARATE AND DISTINCT CAUSE OF ACTION

13. Repeats and realleges paragraphs one through twelve with full force and effect as if fully herein set forth.

14. Plaintiff maintained this position until on or about the middle of July, 1968 when, without notice, Robert E. Johnson, a Negro, walked into plaintiff's office accompanied by Jean MacPherson, a Negro, and stated: "From today on, Miss MacPherson, will be in charge here. You stay with her."

15. Plaintiff protested this act as discriminatory stating that he was qualified and was denied a promotion because of his ethnic origin. Plaintiff was advised that his qualifications would eventually be recognized and the plaintiff continued to perform his assigned duties in a satisfactory manner.

16. During December, 1969, plaintiff was assigned to the Lower Manhattan Office, located at 79 Worth Street, where besides being asked by the defendants to act on behalf of the Division and attend and speak at community functions involving Spanish speaking citizens as a field representative, plaintiff performed various intake functions in a satisfactory manner.

17. Upon information and belief, during the past few years, there have been unfilled higher level positions in the Division where plaintiff's talents and experience could have been used to advantage.

18. On several occasions, during the last three years, and particularly on July 1, 1970, plaintiff requested a promotion to a policy making position in the Division. These requests were summarily denied and it is plaintiff's belief that the available positions remained vacant or were given to others with far less experience and knowledge or the requirements of the New York Puerto Rican Community.

19. At the time that the requests for promotion were made, plaintiff made known to his employer his wide experience with the social and economic needs of the Spanish speaking community and submitted a brief autobiography.

FOR A SECOND SEPARATE AND DISTINCT CAUSE OF ACTION

20. Plaintiff has constantly insisted that his employers recognized the need for more effective communication between the Division and the Spanish speaking community of the State. Plaintiff has criticized the disregard of his employers for the Spanish speaking community which is in

much need of assistance and protection regarding human and civil rights. In this connection, plaintiff has on many occasions called to the attention of his employer and/or employers their failure to print Division material in the Spanish language so as to serve more effectively the 2.5 million persons of Spanish-American origin (over one million Puerto Ricans) residing in the State of New York. Because of plaintiff's continued insistence upon improved relations between the Division and the Spanish speaking community, plaintiff has been, on many occasions subjected to ridicule and embarrassment.

22. Due to the unlawful, discriminatory practice and retaliatory acts of defendants, plaintiff has suffered humiliation, degradation, mental suffering and loss of earning estimated in the total amount of $1,000,000.00.

FOR A THIRD SEPARATE AND DISTINCT CAUSE OF ACTION

23. Repeats and realleges paragraphs one through twenty-two with full force and effect as if fully herein set forth.

24. Plaintiff is of Puerto Rican national origin.

25. Based upon the foregoing, on or about the 20th day of October, 1971, plaintiff filed a verified complaint with the State Division of Human Rights charging the defendants herein with unlawful discriminatory practice relating to employment by denying him equal terms, conditions and privileges of his employment because of his national origin, in violation of the Human Rights Law of the State of New York. However, on or about November 5, 1971, pursuant to Section 297.2 of the New York Executive Law, the State Division of Human Rights determined that it had no jurisdiction to entertain

the complaint. (See "Determination and Order After Investigation", appended herein as Exhibit A). A more complete explanation for the denial of Judisdiction was presented in a letter to plaintiff from defendant Sable dated November 8, 1971 (appended herein Exhibit B). An appeal from the denial of jurisdiction was duly filed with the State Human Rights Appeal Board. On or about December 31, 1971, the decision of the Division of Human Rights denying jurisdiction, was affirmed in all respects. The decision of the State Human Rights Appeal Board (amended herein Exhibit C) was mailed on or about January 11, 1972. Plaintiff thereafter instituted the proceeding pursuant to Section 298 of the New York Executive Law.

26. Said appeal was denied by the Appellate Division First Department on April 13, 1972 essentially with no opinion (see annexed exhibit).

WHEREFORE, plaintiff prays that an order be entered pursuant to the Fourteenth Amendment and 42 USC 1981, 1983 prohibiting defendants from continuing to discriminate against plaintiff in his employment opportunities and conditions, because of his national origin, and further declaring Section 297.2 of the Executive Law of the State of New York to be unconstitutional, for damages of $1,000,000.00 for loss of income, and pension benefits, and for pain and suffering and humiliation.

EDWARD H. WOLF
EDWARD H. WOLF

Dated this 28th day of July, 1972.